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dition of the murderer, it may meet the same response that it did from North Carolina in *State v. Hall*, 114 N. C. 909, 41 Am. St. Rep. 822, namely, that the accused not having been in Tennessee since the crime, *could not have fled from it*. And then a cry will go up against the impotence of the courts and this preposterous condition of the law generally. But the courts cannot exercise a jurisdiction which has not been conferred. The responsibility will lie with the origin and source of jurisdiction—the law-making power.

SUGGESTED CHANGES IN PRACTICE.

PEREMPTORY INSTRUCTIONS, WHERE EVIDENCE NOT SUFFICIENT TO SUSTAIN VERDICT—POWER OF APPELLATE COURT REVERSING JUDGMENT FOR PLAINTIFF, TO ENTER OR DIRECT LOWER COURT TO ENTER JUDGMENT FOR DEFENDANT.

In the case of *White v. Hoster Brewing Co.*, 41 S. E. 180, 8 Virginia Law Register, 293, 885, the Supreme Court of Appeals of West Virginia, breaking away from the long line of precedents in that state and in Virginia, unanimously affirmed the right of a trial court to instruct a jury to find for a party in whose favor the evidence plainly and decidedly preponderates. It stated the question thus:

“The few contradictory statements alleged are not sufficient in importance to materially affect the decided preponderance of evidence, circumstantial and oral, which is undoubtedly in favor of the defendant. On the strength thereof the court instructed the jury that ‘the evidence in this case cannot warrant a verdict for the plaintiff, and they are therefore instructed to find for the defendant.’ There is no question but that, if a verdict had been returned on the evidence it would have been the duty of the court to set it aside, because opposed to the plain and decided preponderance of the evidence. Although the rule prevails in the United States courts and in a majority of State courts that in such a case a verdict should be directed when asked, it has not heretofore been adopted in this State. 6 Enc. Pl. & Prac. 679. The leaning of the early courts of Virginia has been towards the ‘scintilla of evidence’ rule, although in following it repeated verdicts may have to be set aside as contrary to the decided weight and plain

preponderance of the evidence. *Keel v. Herbert* (Va.), 1 Wash. 203; *Hollingsworths v. Dunbar*, 5 Munf. 199; *Fisher's Ex'r v. Duncan*, 1 Hen. & M. 563, 3 Am. Dec. 605; *Martin v. Stover*, 2 Call, 514. The question is now presented whether this court should follow the development of the law slowly crystallizing around the majority rule, sustained as it is by reason or justice, or still cling to the antiquated theories of the minority rule through fear of invading the province of the jury. Shall the circuit court, in a plain case, be compelled to sit still, and permit a jury to bring in a verdict contrary to the plain and decided preponderance of the evidence, and then set it aside, and be compelled to repeat the farce of a trial? Or shall the circuit court follow the settled practice of the courts of the United States, and direct a verdict against the party in whose favor the evidence does not warrant a verdict? 'The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the province of the judge and jury, and fixes where it belongs the responsibility which shall be assumed by the court.' *Merchants National Bank v. State National Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Improvement Co. v. Munson*, 14 Wall. 442, 20 L. Ed. 867."

The court gave its answer to these questions in no uncertain way. In a recent case, *Maupin v. Scottish Union & National Insurance Co.*, 45 S. E. 1003, it has applied the ruling to another phase of the practice. That was a case of the nature of *Virginia Fire and Marine Insurance Company v. Richmond Mica Company*, ante, p. 981, construing the conditions of a fire insurance policy. Unlike our court, however, it followed *Northern Assurance Company v. Grand View Building Association*, 183 U. S. 308, and construed the "iron safe clause" as a promissory warranty, as to a waiver of which oral evidence is incompetent.

This is merely by the way. The ruling to which we wish to call attention is as follows:

"If a defendant, giving no evidence, moves the court to exclude the plaintiff's evidence as not sufficient to warrant a verdict for the plaintiff, or to direct a verdict for him, and his motion is overruled, and this court reverses the judgment for that cause, it will not remand the case for another trial, but will enter judgment for the defendant, or, as it chooses, direct the circuit court to do so, unless satisfied that it will work injustice."

Said Brannon, J., upon this point:

"When the plaintiff concluded his case, the defendant moved the court to exclude the plaintiff's evidence as not sufficient to authorize a verdict for the plaintiff, and to direct the jury to find a verdict for the defendant; but the court refused. The defendant gave no evidence. What shall this court do? Shall it simply reverse the judgment, set aside the verdict, and direct a new trial? Had the court sustained the motion, we could not reverse, because, the evidence being insufficient for recovery by the plaintiff, such action would be warranted by law. *Ketterman v. Railroad*, 48 W. Va. 606, 37 S. E. 683. In that case is discussed the practice, not formerly followed, but now followed generally, of directing a verdict; and the cases there cited hold that when the evidence is so clearly deficient as to give no support to a verdict for the plaintiff, if rendered, the court should exclude the evidence, and direct a verdict, and it is error to refuse to do so. If the court had sustained the motion, the case would have ended in final judgment for defendant, and so it must be our judgment, as we must render such judgment as the Circuit Court ought to have entered. This motion is in no wise different from a demurrer to evidence, and upon that final judgment is always given. The plaintiff so submitted his case. The adverse party is compelled to join in a demurrer, and when a party moves for a verdict he does the same as demur. When there is a special verdict or finding of facts, final judgment is given on reversal, or a mandate is directed to the lower court to do so. *Ft. Scott v. Hickman*, 112 U. S. 150, 165, 5 Sup. Ct. 56, 28 L. Ed. 636. When the court tries the case in place of a jury, and the evidence is plainly insufficient to sustain the judgment, the case is reversed, and final judgment given for defendant. *State v. Miller*, 26 W. Va. 107, 110; *State v. Seabright*, 15 W. Va. 590. How when the verdict is general, and there is no motion to exclude, or to direct a verdict, but the appellate court, on reviewing a motion for a new trial, overruled on the ground that the verdict is contrary to, or without sufficient evidence, so finds? During service on the bench of this court I have seen verdicts set aside for want of evidence in many instances where it was plain that, if the decision of this court were observed, there would certainly be no verdict for the

plaintiff, and it was plain that the case could not be bettered; and the question arose in my mind, why remand for a new trial? The practice has been to remand always under the idea that it was the infallible rule. That is a mistake. In that late very valuable work, *Cyclopedia of Law and Procedure*, vol. 3, 450, 452, 454, these points are fully discussed. Even in the case of a general verdict, if the appellate court finds no cause of action, it gives final judgment, or directs the lower court to do so. And when even the verdict is contrary to evidence, or it is plainly not supported by the evidence, or there is no dispute as to facts, or it is plain that a new trial would serve no useful purpose, there should be final judgment in the interest of an end of litigation. It is in the sound discretion to enter or direct final judgment or award a new trial. An important question, however, may arise in the exercise of this discretion. It is laid down in *New York* that 'extreme caution should be exercised in refusing new trials where judgments are reversed. The discretion should be exercised by appellate courts in that direction only in cases where it is entirely plain, either from the pleadings or the very nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit. It is not sufficient, to refuse a new trial, that it is highly improbable that the party upon reversal can succeed upon the new trial. It must appear that he certainly cannot.' *New v. Village*, 158 N. Y. 41, 43, 52 N. E. 647. Does not the last clause quoted go too far? I think the statement of law in 3 Cyc. 454, more sound, and that is that a new trial will be awarded 'whenever it appears to be necessary for the purposes of justice;' 'whenever it appears that the ends of justice will best be served by such course.' The party has had one jury trial. It is fairly presumable that he presented all the evidence of his case. He has submitted his case upon the evidence. Is the appellate court to surmise and guess that he can produce more? If he did not produce it, he is guilty of negligence. If he discovered it before judgment, we presume he would have made it the basis of a motion in the lower court for a new trial. If he discovered it after judgment, and he is guilty of no negligence, and it is of proper import, it is basis for equity action. Is the appellate court not to presume that he cannot better his case, unless it sees that he can or may? I see no differ-

ence, in this respect, between a case tried by a court and one tried by a jury. It is in the discretion of the appellate court in either case to grant a new trial, but only when justice appears to demand it. But the matters just mentioned, though relative to the general subject, are not the question before us. That is much plainer against a new trial. We have the case of a motion to direct a verdict improperly overruled. The jury found that Maupin had not complied with the policy, but was excused by the agent, which could not in law be. And no evidence tended to show any excuse for leaving the books in the store to be burnt.

"Therefore we reverse the judgment, set aside the verdicts, and render judgment for the defendant."

Upon the ruling in *White v. Brewing Co.*, supra, our views *concordant* have been expressed at length in the volume indicated. It must suffice to say here that it seems an anomaly, as well as a sacrifice of valuable time, to permit the prolongation of a trial by elaborate argument of instructions upon pure scintillas of evidence when the trial judge was mentally determined to set aside any verdict which may be rendered for one of the parties, where the evidence plainly will not support it. Under our practice, he can only, patiently or with words which he may mutter but not utter, shift from one position in his chair to another and fan the flies away throughout the hours and hours of argument by counsel and deliberation by jury—all incident to, and predicated upon, the sacred scintilla.

We do not know what would have been the effect of the bill introduced into the last General Assembly (*ante*, p. 915), abolishing demurrers to evidence, had it become a law. It might of itself, whether so intended or not, have led our courts to adopt the practice of the federal courts, West Virginia and the great majority of the other States, *for there must be provided some way of judicially ascertaining that a case is structurally weak, when the evidence, or the lack of it, calls for such a ruling.* We do know, however, that in forums other than those of this State, the defendant is entitled to have the legal sufficiency of the plaintiff's evidence passed upon by the court without the heavy handicap of admitting the truth of all the adversary testimony and of the legitimate inferences therefrom. We express the views of a large proportion of the bar of this state when we say that

we trust that at no distant day our appellate court, without waiting for legislative action, will do what it has often done before under other conditions and will itself, by the recognition of the principle in question, so amend our practice as to conform it to modern standards, which have been tested by time and experience, and still remain standards.

We could not better illustrate our view than by the cases of *Southern Railway Co. v. Hall*, ante, p. 780, and *Norfolk & Western Ry Co. v. Hawkes*, reported elsewhere in this number. In the former case, a judgment for plaintiff was reversed *as a matter of law* because of the absence of affirmative proof of the negligence of defendant, the court declining to accept inference and conjecture as a substitute for fact. In the latter case the court was of opinion that, *as a matter of law*, the plaintiff had been guilty of contributory negligence. Why then, we ask, should not the trial court in both cases have peremptorily directed a verdict for the defendant, or upon its failure so to do, why should not the appellate court have reversed the judgment directing the trial court to grant such an instruction, if upon a second trial the evidence should be substantially the same?

But this brings us to the ruling in *Maupin v. Scottish Union &c. Co.*, supra, and we inquire, Why should not the appellate court, in the cases last mentioned, have reversed the judgments, and, proceeding to enter such judgment as the lower court should have entered, give final judgment for defendant? The answer may be, Because a judgment in a common law cause is predicated upon a verdict or a waiver of a jury. But, under conditions like these, that is mere form without substance, for no verdict other than one in obedience to the views of the court is to be contemplated as even a remote possibility. And again it is the established practice to pursue this course not only upon demurrer to evidence, but also where all matters of law and fact have been submitted to the trial court, and a judgment for plaintiff is reversed on appeal. See *Mutual Reserve Fund v. Taylor*, 99 Va. 208. Why is the judgment in such cases not merely reversed and the cause remanded for a new trial, upon which further evidence may be adduced? The wisdom of the *Maupin* ruling upon this point is to us manifest. It merely asserts the right of the court to presume that all the evidence that could have been introduced

was introduced, and, in the interest of prompt adjudication of the rights of the litigants, to dispose of the controversy by a final judgment, instead of giving to a party whose case has been pronounced insufficient, a chance to mend his hold, and, by prolonging litigation upon alleged new theories, to avail himself of casualties, such as the death or disappearance of witnesses, and succeed where, upon substantially the same case, he has signally failed.